United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1965

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1965

MODERN HOME INSTITUTE, INC.
ROMAC RESOURCES, INC.
Plaintiffs - Appellants

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY
HARTFORD FIRE INSURANCE CO.
THE AETNA CASUALTY AND SURETY CO.
THE TRAVELERS INSURANCE COMPANY
THE TRAVELERS INDEMNITY CO.
THE CONNECTICUT ASSOCIATION OF
INDEPENDENT AGENTS, INC.
Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, CIVIL ACTIONS 11386 AND 11464

BRIEF OF DEFENDANTS — APPELLEES THE TRAVELERS INSURANCE COMPANY AND THE TRAVELERS INDEMNITY COMPANY

GEORGE D. BRODIGAN
McNAMARA & BRODIGAN
102 Oak Street
Hartford, Connecticut 06106

To be argued by:
GEORGE D. BRODIGAN

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STATEMENT OF ISSUES

In their Brief Modern Home Institute, Inc. and Romac Resources, Inc. (hereinafter referred to as "Plaintiffs") pose four issues. Defendants, Travelers Insurance Company and Travelers Indemnity Company (hereinafter referred to as "Travelers"), believe that this appeal, as per it, centers on only one issue and that is:

> Was Travelers Insurance Company's decision not to purchase Plaintiffs' product made unilaterally, and not in concert with, or interdependent on, the other Defendants' decisions?

It is submitted that, as per Travelers, this is the only issue with which this Court is presented on appeal. This premise is in essence concurred with by Plaintiffs in their Brief, wherein they state: "The issue which was before the district judge, and that which is before this court, is whether those refusals were based on unilateral and ordinary business decisions or whether they were part of a pattern of conduct evidence and agreement among the Defendants in violation of the Sherman Act." (Appellants' Brief pg. 6). These sentiments are repeated throughout the Appellants' Brief. (See pages 13, and 37 where Plaintiffs state: "But the *significant question* to ask is whether the action taken by the alleged conspirators is 'independent' and unilateral or 'interdependent' " (Emphasis added); or, page 54 where Plaintiffs state: "The *only* question which is appropriately considered is whether the determination not to purchase was a unilateral or interdependent one" (Emphasis added).

It is submitted to this Court that the only issue confronting it as per the Travelers may be stated thus:

> Was the decision by Travelers not to purchase Plaintiffs' product unilaterally made, without any influence by the other Defendants, or interdependent upon their decision?

STATEMENT OF THE CASE

This case has been succinctly stated in the District Court's Ruling on the Motions for Summary Judgment (Rulings, pgs. 1-14) such that repetition here is not necessary. However, three additional facts should be brought to the attention of this Court. First, Romac and Modern Home, Plaintiffs-Appellants in this case, were one and the same entities. There was no distinction between them. In his deposition Mr. Robert D'Arpa, an officer of both companies, admitted that any business done by Romac was actually done by Modern Home (D'Arpa dep. pg. 318; Appx. 110a); that Romac, a sales organization for Modern Home, did no business of its own (D'Arpa dep. pg. 316, Appx. 108a); and that Romac was really Modern (D'Arpa dep. pg. 579, Appx. 116a). Therefore, to claim, as have Plaintiffs, that they as two organizations have been damaged to the extent of $15,000,000 each is shear exaggeration; and, in a word, nothing more than duplicity.

Secondly, that these actions have a protracted history is an understatement. Romac Resources commenced its action (No. 11386) on April 15, 1966. Modern Home Institute, Inc. commenced its action (No. 11464) on June 8, 1966. The allegations in both actions were identical (which is understandable since both organizations were one and the same) and the actions were consolidated on June 29, 1966. The gravamen of the original actions was that the 12 insurance companies and the agents' association contracted, combined and conspired with each other in refusing to purchase from Plaintiffs a list of expiration dates of automobile insurance policies, known in the industry as "X-dates" (Complaints paras. 22, 23, 24; Appx. 6aaa). The essence of these allegations was that of a horizontal conspiracy.

On November 8, 1971, over five years after the original actions were commenced, Plaintiffs moved to file an Amended Substituted Consolidated Complaint. That Complaint changed the thrust of Plaintiffs' contentions and injected a new theory by Plaintiffs, shifting the emphasis from that of the Defendants combining and conspiring with each other, to that of the agency companies having combined and conspired with their agents in course of "deliberate interdependent consciously parallel conduct" in refusing to deal with Plaintiffs (Amended Substituted Consolidated Complaint Paragraphs 31-56; Appx. 10-18aa). The new thrust was that of vertical conspiracy. Because the direct writer companies (Nationwide, Liberty Mutual, State Farm and Allstate) did not have as their marketing force independent agents, these Defendants were voluntarily dismissed, thereby leaving Plaintiffs to center their attack on the agency companies.

Thirdly, this case is as complete and comprehensive as the Plaintiffs could ask for. This litigation consumed seven years before these Defendants moved for Summary Judgment (April 1966-April 1973). There are approximately 150 pleadings, numerous exhibits, and affidavits and 5135 pages of deposition testimony. Of this, depositions were taken of 20 persons: four by the Defendants and sixteen by Plaintiffs. All of the named Defendants had the deposition of at least two or more of its personnel taken. Clearly, Plaintiffs have had full access to all the records, and documents and personnel of the Defendants that they could possibly ask for. And, at no time were they denied access to any of either Travelers' documents or personnel.

ARGUMENT

I. Travelers' Decision Not to Purchase the Plaintiffs' Product Was Unilaterally Made and Without the Slighest Scintilla of Any Contact With Any of the Other Defendants, Nor Any Agent, and Was Made Without Any Knowledge of What the Other Companies Were Doing.

All of Plaintiffs' contacts with Travelers regarding the sale of expiration dates can be summarized as follows:

On April 18, 1962, Mr. Robert D'Arpa and Mr. Max Wallach of Modern Home met with Mr. John R. Coakley, then Superintendent of Agencies of the Travelers' Casualty Department, and his assistant, Mr. Audrow Nash, concerning the sale of X-dates. These individuals offered to provide Travelers with lists of the expiration dates of automobile insurance policies on a geographical basis (D'Arpa dep. pp. 575-577; Appx. 111-114a). Mr. Wallach and Mr. D'Arpa were advised by Messrs. Coakley and Nash that neither had the authority to decide whether Travelers would purchase such a product, but that the matter would have to be discussed with Mr. Virgil Roby, then a Travelers Vice-President and their immediate superior, who could make such a decision (Coakley dep. pg. 5110-5111; Appx. 429-430a).

Messrs. Coakley and Nash advised Mr. Roby of the proposal which had been submitted by the Plaintiffs and Mr. Roby rejected it (Coakley dep. pp. 5114-5115; Appx. 433-434a). When deposed, Mr. Roby testified that upon hearing the proposal he stated, "I reject it. Absolutely." (Roby dep. pp. 5006, 5017, 5030 and 5032; Appx. 376a, 386a, 389a, 391a). Mr. Roby's reason for Travelers not wanting to purchase the X-dates was because to do so would violate a basic tenet of the American Agency System; that is, that expiration lists are the property of the agent (Roby dep. pp. 5006-7, 5011-2, 5017-8; Appx. 377-8a, 381-2a, 386-7a).

By letter dated May 15, 1962 (Def. Ex. 55; Appx. 153aa), Mr. D'Arpa contacted Mr. Coakley and outlined the substance of the proposal which had previously been set forth orally at the meeting on April 18, 1962. Mr. Coakley immediately acknowledged receipt of that letter by telephone (Coakley dep. p. 5111, Appx. 430a); and then, on May 18, 1962 wrote Mr. D'Arpa and advised him that "Because of the Travelers commitment to the independent system of agency representation (that is, the ownership of expiration by the agent himself) we cannot at the present time agree to be responsible *as a company* for the purchase of this information." (Def. Ex. 56; Appx. 453a (Emphasis added)). Mr. Coakley added that the Travelers would consider the idea of offering the X-dates to its independent agents, to be purchased by them, ". . . but at the present time the Travelers will not pay for this information itself." (Def. Ex. 56; Appx. 453a)

Subsequently, on June 25, 1962, when it became known that X-dates were being offered by Plaintiffs to other insurance companies, Mr. Roby directed that a letter be sent by his managers to Travelers' agents which stated that Travelers would not purchase such lists, because ownership of X-dates was the property of the agent (Def. Ex. 3; Appx. 454-5a).

On July 5, 1962, Travelers' managers sent a letter to its agents advising them that Travelers had been offered lists of expiration dates for automobile insurance policies, but that the proposal had been rejected because ownership of such dates was the property of the agent (Def. Ex. 57; Appx. 456a).

The above-cited transactions: the meeting on April 18, 1962, Mr. D'Arpa's letter to Mr. Coakley of May 15, 1962, Mr. Coakley's letter to Mr. D'Arpa of May 18 1962, Mr. Roby's directive to his managers of June 25, 1962, and Mr. Crossley's letter of July 5, 1962, constitute the totality of Travelers' involvement in this entire matter.

One of Appellants' headings is captioned "The Defendants Were Initially Enthusiastic." (Appellants' Brief, pp. 15-18). The same devotes all of six lines to Travelers. There is no question that Messrs. Coakley and Nash did show interest, especially in view that Mr. Coakley's responsibilities at the time were in agency development and sales promotion. But at this first, and only, meeting Messrs. Coakley and Nash made it clear to Messrs. D'Arpa and Wallach that they had to take up the matter with Mr. Roby, who rejected the proposal for reasons already stated.

"Enthusiasm" is a matter of interpretation; but, clearly, to show interest does not in and of itself mean enthusiasm. However, even if Travelers' initial reaction to Plaintiffs' proposal was one of enthusiasm, such is not, in and of itself, the basis for alleging violations of the anti-trust laws of the United States.

Plaintiffs allege in their Amended Substituted Consolidated Complaint that Travelers committed numerous violations of the anti-trust laws of the United States (paras. 51-57, Appx. 16-18aa). A careful examination of all of the transcripts of testimony taken and documents provided Plaintiffs in this matter disclose that there is no basis whatsoever for this claim.

When Mr. D'Arpa was deposed he was asked the very simple question of what Travelers had done that violated the anti-trust laws. Mr. D'Arpa replied that, except for the letter of July 5, 1962, from Travelers to its own agents, he had no knowledge of any acts committed by Travelers which would constitute a violation of the anti-trust laws (D'Arpa dep. pp. 586-593; Appx. 123-130a). But, he also testified that Travelers had a right to send out such a letter (D'Arpa dep. p. 587; Appx. 124a).

When Mr. D'Arpa was specifically questioned as to what Travelers had done in connection with this alleged combination and conspiracy to unreasonably restrain trade, again Mr. D'Arpa's only response was Travelers letter

of July 5, 1962 to its agents (D'Arpa dep. pp. 586-587; Appx. 123a-124a). When specifically asked what Travelers had done to eliminate and suppress competition through an unlawful boycott, Mr. D'Arpa replied: "They didn't buy our program." (D'Arpa dep. pg. 588; Appx. 125a). When specifically questioned about what Travelers had done to restrain Plaintiffs from marketing their product, Mr. D'Arpa again replied, Travelers letter of July 5, 1962 (D'Arpa dep. pgs. 590-591, Appx. 127a-128a). And, when asked whether anyone from Travelers had ever talked with other companies in an effort to boycott Plaintiffs, Mr. D'Arpa replied that he had no such knowledge (D'Arpa dep. p. 596; Appx. 133a).

Travelers' decision not to purchase Plaintiffs' product was reached independently and in a straightforward manner by Mr. Roby. When Messrs. Coakley and Nash presented the Plaintiffs' proposition to Mr. Roby, who had the decision-making responsibility, he stated, "I reject it. Absolutely." His reason for rejecting the proposal has been stated in his deposition, in Travelers' letter of May 18, 1962 to Plaintiffs, and in the letter of July 5, 1962 to the Travelers' agents.

Apparently what has incited Plaintiffs is Travelers' letter of July 5, 1962 (Def. Ex. 57; Appx. 456a). That letter is a memorandum that Travelers sent out to its agents advising them that Travelers was not going to purchase Plaintiffs' lists of X-dates because it felt the expiration dates were the property of the independent agents. It merely reiterated what Travelers had previously advised Plaintiffs by Mr. Coakley's letter of May 18, 1962; namely, that Travelers was not interested in purchasing expiration dates. Thus, *before* Travelers sent out its letter of July 5, 1962 Plaintiffs knew Travelers was not interested in their program, and the reasons why. In his deposition Mr. D'Arpa testified that Travelers had rejected Plaintiffs' proposal of May 15, 1962 via Mr. Coakley's letter of May 18,

1962 (D'Arpa dep. pg. 582; Appx. 119a). And further, in response to a question if Travelers had "a perfect right to reject your proposition . . ." he answered, "Certainly." (D'Arpa dep. pp. 582-583); Appx. 119a-120a).

At this juncture it might be well to respond to a point attempted to be stressed by Plaintiffs in their Brief concerning Mr. Roby's "inconsistency" (Footnote 4, pg. 23, Appellants' Brief; See also pgs. 32 and 33). In support of this allegation Plaintiffs cite Mr. Coakley's letter of May 18, 1962, and quote: "All of us are extremely interested in the great possibilities of this device, which would provide the important information concerning the expiration date for suburban market." (Appellants' Brief pg. 32, 33). But Plaintiffs fail to cite that in that very same letter Mr. Coakley went on to say that because of Travelers' adherence to the American Agency System it would not be able to buy Plaintiffs' product, but that its agents might be interested (Def. Ex. 56; Appx. 453a). This letter is consistent with Mr. Roby's reasons for rejection, and it so states the same.

Plaintiffs have taken depositions of three Travelers' personnel who were involved in this matter, namely, Messrs. Roby, Crossley and Coakley (Mr. Nash is now deceased). All three stated that they have had no communication, either written or oral, with any other company or agent whatsoever, either before or after Travelers had been contacted by Plaintiffs (Roby dep. pp. 5045, 5083, 5085; Appx. 399a, 417a, 419a. Crossley dep. pp. 5056, 5062-5064; Appx 402a, 403a-405a. Coakley dep. p. 5127; Appx. 441a).

Moreover, the Record in this case is absolutely devoid of any evidence which demonstrates that Travelers was involved in a conspiracy with any of the other named defendants, nor anyone else for that matter, to violate the anti-trust laws of the United States. Nowhere in the Record, be it in the depositions of Travelers' personnel or discovery of Travelers' files, or in the depositions of the other Defendants and discovery of their files, is there any evidence

that Travelers acted in concert with the other Defendants, or any agents, in arriving at its decision not to purchase the X-lists from Plaintiffs. The lack of any such evidence is easily explained. Simply stated, Travelers did not in any way or at any time communicate with *anyone* outside the Travelers before or after its decision not to purchase such lists.

Accordingly, Travelers' conduct can, it is submitted, be deemed ". . . wholly unilateral and beyond the reach of § 1 of the Sherman Act." *Albrecht v. The Herald Co.*, 390 U.S. 145, 149 (1968). The facts here, as per Travelers, are of the "Doric simplicity" that the Court spoke of in *Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2nd Cir. 1960).

Travelers chose not to purchase Plaintiffs' product and it subsequently informed its agents. That was the extent of its involvement. In so doing, because its conduct did not "go beyond mere announcement of [its] policy and the simple refusal to deal", it cannot be held to have violated the antitrust laws. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *Warner & Co. v. Black & Decker*, *supra* at 790.

II. Travelers Had the Right to Refuse to Buy Plaintiffs' Product.

As early as 1919 the United States Supreme Court held that the Sherman Act ". . . does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The Colgate doctrine has subsequently been upheld by the courts, so long as the refusal to deal of the trader or manufacturer is based on unilateral, and not joint, action. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960); *House*

of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 870 (2nd Cir. 1962); *Poller v. Columbia Broadcasting System, Inc.*, 174 F. Supp. 802, 804 (D.D.C. 1959) *rev'd* on other grounds, 368 U.S. 464 (1962).

There is no question but that "any person has a right to buy or sell from or to whom he chooses and he may deal or refuse to deal with anyone that he selects, provided he does not enter into an illegal conspiracy with someone else to exclude another person from the channels of trade." *Poller v. Columbia Broadcasting System, Inc., supra* at 804.

The Record in this case clearly reveals that Travelers independently determined that, for itself, it would not buy Plaintiffs' lists of X-dates. Further, the Record is clear that no one from Travelers ever communicated with anyone from any other insurance company, nor any agent, with regard to Plaintiffs' expiration lists. Plaintiffs have been unable to produce the slightest bit of evidence of any contracts, combinations or conspiracy between Travelers and anyone else in that connection.

In the case of *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971), Burgermeister Brewing Co., a manufacturer of beer, terminated some of its distributors based on an evaluation of their physical facilities, transportation equipment, personnel and past sales record. In finding no violation of the anti-trust laws for such conduct, the Court stated that a manufacturer or producer has a right to deal with whomever he pleases and to select his customers at will, so long as there is no resultant effect which is violative of the anti-trust laws.

The case of *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3rd Cir. 1961) *cert. denied*, 369 U.S. 839 (1962) is quite similar to the case at bar. The plaintiff corporation was organized to sell tax free tobacco products and liquor to vessels engaged in foreign trade in

the Port of Philadelphia. It applied to the defendant and four other tobacco companies for a "direct listing" to enable it to purchase cigarettes tax-free for resale to ships. Each of the tobacco companies declined to sell cigarettes to the plaintiff, and it never commenced to do business. At the time the defendant tobacco companies refused to do business with the plaintiff they were already dealing with another firm which was established in the business. In finding that no conspiracy existed amongst the defendants, and in upholding the District Court's decision in granting the defendant's motion for a directed verdict, the Court of Appeals indicated that sufficient business reasons existed for the defendants' refusal to deal with the plaintiff, namely, "that their representation in the Port of Philadelphia was adequate and that the information disclosed by investigation and the plaintiff's applications did not indicate that it had the experience, financial responsibility and other attributes which would qualify it as a potential successful distributor." *Id.* at 206.

Thus, under *Ricchetti*, a manufacturer may discontinue a relationship; or, under *Delaware Valley*, may *refuse to open a new relationship* for valid business reasons. And, any adverse effect on the business of the distributor is immaterial, absent any arrangement restricting trade or competition.

In the case at bar Travelers made an independent decision to refuse to deal with Plaintiffs. It had the right to do so, and had a sound business reason for its decision. This was, that its agents already owned the expiration dates which Plaintiffs were attempting to sell to Travelers. (See District Court's Ruling, pgs. 15-18; Appx. 36-39aa) And, Travelers intended to respect this ownership right.

III. No "Interdependent Consciously Parallel Action" Existed Amongst the Defendants.

In their Amended Substituted Consolidated Complaint, Plaintiffs for the first time included an allegation that

the "defendant insurance companies engaged in a course of deliberately interdependent consciously parallel action in refusing to deal with the plaintiff." (Amended Substituted Consolidated Complaint, para. 25; Appx. 9aa). Since no evidence of any direct conspiracy exists, it appears that Plaintiffs intend to rely on the doctrine of "conscious parallelism" to carry the day for them.

Plaintiffs apparently base this contention on the Hartford Companies' letter of June 6, 1962, sent its agents advising them that it would not purchase Plaintiffs' lists of expiration dates (Appellants' Brief p. 26). However, on May 18, 1962, *before* the Hartford's letter of June 6, 1962, to its agents, Travelers had already advised Plaintiffs that it would not purchase their product. Thus, Travelers' decision was not in response to the Hartford's letter of June 6, 1962, to its agents. It was a completely independent one.

In *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), the leading case on conscious parallelism, the Supreme Court held:

> "The *crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express.* To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. (Citations omitted) *But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.* Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but *conscious parallelism has not yet read conspiracy out of the Sherman Act entirely." Id.* at 540, 541 (Footnote omitted, Emphasis added).

In *Viking Theatre Corp. v. Paramount Film Distrib. Corp.*, 320 F.2d 285 (3rd Cir. 1963), the court held:

> "The gravamen of a civil action under the antitrust

> laws is conspiracy, the proof of which may rest, as it frequently does, on circumstantial evidence. The courts have recognized the difficulty inhering in an attempt to prove conspiratorial conduct by such evidence. The difficulty has resulted in some relaxation of the requirements of proof and resort to the doctrine of "conscious parallelism." However ameliorative the doctrine may be, *it has not dispensed with the requisite that conspiracy be proved.* (Citations omitted) In the application of the doctrine the courts have recognized that certain parallel behavior is inherent in many business settings. *Therefore, it has been held that proof of a conspiracy may not rest on similarity of conduct in the absence of evidence that the alleged wrongdoers were mutually aware of such conduct and that the mutual awareness entered into their decisional processes."* *Id.* at 299. (Citations omitted, Emphasis added).

The impact of the above decisions is obvious: evidence of parallel conduct does not obviate the necessity of proving that a conspiracy between defendants *did in fact* exist. Thus, the key question here is whether the activity complained of, i.e., the decision by Travelers not to purchase Plaintiffs' expiration lists, was the result of an express or tacit agreement with the other Defendants. In other words, decisions made by competitors not to deal with a third party are not violative of the anti-trust laws so long as they are arrived at independently of each other. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Moreover, it has been held that conscious parallelism, standing alone, does not establish a conspiracy, particularly where, as in the present case, competitive conditions compel identical treatment. *Winchester Theatre Co. v. Paramount Film Distrib. Corp.*, 324 F.2d 652, 653 (1st Cir. 1963). And at that, there was no such conscious parallelism here.

The Record in this case clearly shows that Travelers' decision to reject Plaintiffs' proposal was not made in concert with the other Defendants, nor was it dependent on

the other Defendants' making the same decision. Travelers, through Mr. Coakley, replied to Plaintiffs' written inquiry of May 15, 1962 without delay on May 18, 1962; and, *for itself*, rejected Plaintiffs' proposal.

Moreover, various reasons have been set forth by the Defendants for refusing to purchase Plaintiffs' program. Travelers' reason for rejecting the proposal has already been stated. Aetna refused because of the cost involved (Ellis dep. pp. 3416, 3425-3426; Appx. 283a, 291-292a. Van Gils dep. pp. 3278, 3300; Appx. 234a, 238a). The Hartford refused because it felt its agents owned the expiration dates (Barlow dep. pp. 4096, 4103; Appx. 340a, 347a). In addition, the Insurance Commissioner of Connecticut questioned the legality of Plaintiffs' proposed transaction (District Courts Ruling, p. 18; Appx. 39-40aa). It is noteworthy that the other Defendants rejected Plaintiffs' proposal, and the Insurance Commissioner acted, *after* Travelers had done so. Further, Plaintiffs had not even contacted or submitted their proposal to some of the other Defendants until after the Travelers had rejected it.

Because Travelers' action was taken independently and was not made with knowledge of the other Defendants' actions, or in concert with anyone else, no allegations of interdependent action can lodge against it. *Theatre Enterprises v. Paramount Film Distrib. Corp., supra; Viking Theatre Corp. v. Paramount Film Distrib. Corp., supra; Dahl, Inc. v. Ray Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3rd Cir. 1963).

Plaintiffs' contention that Travelers engaged in "a course of deliberately interdependent consciously parallel action" is without merit.

IV. Travelers' Adherence to the "American Agency System" Did Not Violate the Anti-Trust Laws.

In their thrust to establish a vertical conspiracy between

the agency companies and their agents, Plaintiffs have put much emphasis on the nature of this relationship, and the fact that each of the companies has acknowledged that ownership of expiration lists is the property of their agents. In his Ruling of June 18, 1974, Judge Blumenfeld went into this area in considerable detail (pgs. 15-18), such that repetition is not necessary.

However, a few points should be set forth. First, Plaintiffs state that Mr. Barlow (of the Hartford) in his deposition testified that expiration lists are the "life blood of the industry" (Appellants' Brief pg. 5). Mr. Barlow did *not* say this. What he did say in his deposition was: "*Agents* feel that they own their expirations, and that they are - - the life blood of *their* business, *the continuation of their* business. " (Barlow dep. pg. 4117; Appx. 360a (Emphasis added)). Mr. Coakley also stated the same premise in his deposition (Coakley dep. pg. 5111; Appx. 430a), as did Mr. Crosson in his (Crosson dep. pg. 4145; Appx. 364a).

Secondly, the agency companies—certainly Travelers, anyway—do not "cede" the ownership of expiration dates to independent agents upon termination of their policies, as Plaintiffs allege Mr. Roby testified in his deposition (Appellants' Brief pg. 18). This is *not* the case, and Mr. Roby did *not* say this. In his deposition Mr. Roby was asked the following question by Plaintiffs' counsel: "Well, in the event the agent failed to pay all collected premiums, then the company kept control of the expirations. Isn't that so?" Answer: "No, you are wrong. No." (Roby dep. pp. 5012-5013; Appx. 382a-383a). Further, Mr. Roby, after discussing the basic provisions of Travelers' contract with its agent, namely paragraph 9 (which is hereinafter discussed), went on to state: "But the expiration, whether he has paid it [referring to premium], or not to us, belongs to him." (Roby deposition pg. 5014; Appx. 384a).

The third misstatement made by Plaintiffs was that "At oral argument counsel for defendant Travelers ad-

mitted to the existence in the industry of such a custom." (Appellants' Brief pg. 15) The "custom" Appellant refers to is the alleged practice of "exclusively allocated the business of finding and selling expiration dates to independent agents". (Appellants' Brief pg. 14) Counsel for the Travelers made no such statement. What counsel for the Travelers did say was this:

THE COURT: What about that statement, "because we are committed to the American Agency System, we cannot buy this"?

MR. BRODIGAN: "We cannot buy this"?

THE COURT: What is that?

MR. BRODIGAN: I beg your pardon?

THE COURT: Your adversary argues that alone is a commitment to an organized coercion.

MR. BRODIGAN: I think that is not so at all. It is an established fact that *we can't buy it because we recognize this is a property right in somebody else;* but the agents can buy it. It is that, purely and simply.

I think it is terribly important to be understood that *these plaintiffs in this case* — and we put this in our brief — *were never deprived the right of marketing their product.* But, they picked the wrong market; they picked the wrong company. They could have gone out to the agents if they wanted.

THE COURT: The expiration dates, as far as the company is concerned, is the property right of the individual agent, and has always been so; is that right?

MR. BRODIGAN: Yes. That is the reason for this — except as set forth in our brief, and also my affidavit, which has some articles published on it.

THE COURT: All right.

THE COURT: Suppose, counselor, if one company bought these X-dates, as you call them, expiration dates, in order to stay in business and be competitive, then every other company would have to buy them, would they not?

MR. BRODIGAN: Not necessarily.

THE COURT: It wouldn't necessarily follow?

MR. BRODIGAN: No, no. That is where they want to market it. They went to six agency companies, six direct writer companies, and at the conclusion of their solicitation, they said, We feel very strongly that yours is the company we would like to do business with.

In other words, in effect playing it right down, one company — well, playing the same game with each company.

THE COURT: If the direct writing companies got all the expiration dates as the agency companies, and the agency companies didn't buy the same expiration dates to protect themselves, they could almost put them out of business, theoretically, couldn't they?

MR. BRODIGAN: Yes. But I think the key thing is that these three companies were committed to a principle — let me put it this way: The agency, your Honor, the American Agencies, that is their market device. It may be outmoded. A lot of insurance industry articles speak about that. It may be outmoded, but the fact of the matter is, there it is. And we put it in our brief. If it is a property right, it has to be owned by somebody, and who better than the agent, the man who goes out and hustles these? He should be the one who should own it. It is as simple as that.

THE COURT: All right.

(Transcript of Oral Argument on Defendants' Motions for Summary Judgment, June 25, 1973, pp. 94-96 (Emphasis added)). In sum, all Travelers counsel did was to restate Travelers' position, previously made known to Plaintiffs.

Turning to Travelers' contract with its agent, the same contains the following provision:

> 9. In the event of termination of this contract, provided the agent shall pay all collected premiums to the company immediately, the Agent's records, uses, and control of expirations shall *remain* his property and be *left* in his absolute possession.

(Trav. Ex. 1; Appx. 457a (Emphasis added))

There are several reasons for including such a provision in the agency contract. First and foremost, agency compa-

nies such as Travelers are dependent upon agents to bring them business (Roby dep. p. 5012; Appx. 382a). It is the agent who solicits and procures the insureds. It is his "beating the bushes", his endeavors, and his techniques that bring the insurer and the insured together. This being so, it is only natural that the "control of expirations" should belong to the agents.

Plaintiffs, however, contend that such a provision prevents them from selling their product at all (Appellants' Brief pp. 18-25). This is not so. If Travelers declined to purchase Plaintiffs' product, for reasons explained in Mr. Coakley's letter of May 18, 1962, Plaintiffs were not precluded from selling such lists directly to Travelers' agents. In fact, Mr. Coakley's letter states this. Yet Plaintiffs chose not to follow that course and instead decided to market their product directly with the agency companies and thereby pass the agents.

All that Paragraph 9 of Travelers' contract with its agents says is that "control of expirations shall remain [the agent's] property." In so stating, Travelers thereby acknowledges that it does not have control or ownership of such lists. And, for reasons stated above, this is only fair.

As to the legality of such an agreement, there is no better response than what was said by the Supreme Court in the classic *Chicago Board of Trade* case, in which the Court stated the following:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. *Every* agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (Emphasis added).

It is by his retention of the expiration dates that the agent builds up his clientele. To allow otherwise would enable an insurer at the expiration of a policy period, which is ordinarily one year in the case of automobile insurance, to make contact directly with the insured and thereby bypass the agent.

Another reason is that an agent more often than not writes for several insurance companies and not just one (Crosson dep. p. 4146; Appx. 365a). Thus, were a company such as Travelers to take the position that once an insured is brought to it by an agent, the insured becomes the property of the insurer, obviously no agent would write for that company. See *General Insurance* by David Bickelhaupt & John Magee, Irwin Co. (8th ed. 1970), p. 94-95; (Appx. 74-75aa)

A third reason for the provision is even more practical. That is, if "control of expirations" is a property right — which the American Agency System believes it is — then someone has to own the property. And, given all the circumstances as herein set forth, who, as between the agent and the company, is the more entitled? After all, the agent is the person who procured the insured in the first instance and is, therefore, the more logical choice to retain control of the expiration date. See *Risk and Insurance* by Mark R. Greene, S. W. Publ. Co., (2d ed. 1968) pp. 131-132 (Appx. 85-86aaa); *General Insurance* by David Bickelhaupt & John Magee, *supra* pp. 94-96 (Appx. 74-76aaa); *Property and Liability Insurance Handbook*, by John D. Long and Davis W. Gregg, Irwin Co. (1965), p. 941 (Appx. 92aaa).

The important thing to note is that Paragraph 9 does *not*, as contended by Plaintiffs, foreclose Plaintiffs from marketing their product. Plaintiffs still had available to them as purchasers the entire Travelers agency force; and,

for that matter, those of the other Defendant companies as well.

Thus, Travelers' contract with its agents, notably Paragraph 9, does not restrict competition.

V. Travelers Was Unaware of, Nor Did it Ever Participate in, Any "Campaign of Pressure."

In their Brief Plaintiffs allege a "campaign of pressure," centering the same upon Hartford's letter of June, 1962 to its agents. In the process they speak of Mr. Roby's "refusal" to admit that he followed the Hartford's letter (Appellants' Brief pg. 29). Again, this is not the case. When Mr. Roby was first shown the form of the Hartford letter and asked about it he said: "I don't know. How would I know that? I had nothing to do with the Hartford." (Roby dep. pg. 5044; Appx. 398a) And, he went on to say: "No. No, no, and I never discussed any part of this thing with anyone else outside of Coakley and - - and Nash." (Roby dep. p. 5045; Appx. 399a)

Mr. Roby at first did not recognize his letter of June 25, 1962. Then, after the same, plus the Hartford letter had been shown to him, he did (Roby dep. pg. 5037; Appx. 392a). Because of this confusion, upon cross examination by his counsel, Mr. Roby testified that he retired from Travelers at an early age because of medical reasons and since his retirement had been experiencing problems of health (Roby dep. pgs. 5076-5080; Appx. 412a). Moreover, because Mr. Roby obviously had trouble, at first, in recalling his directive of June 25, 1962, a letter from him to Travelers' counsel, dated September 25, 1965, was read into his deposition. The same was a recitation of his meeting with Messrs. Coakley and Nash, why Travelers rejected Plaintiffs' proposal, and lack of involvement with any person outside of Travelers (Roby dep. pp. 5080-5084; Appx. 413a-418a).

As to any "caimpaign of pressure" contended by Plain-

tiffs to have been conducted by the agents of the three remaining Defendants, Travelers' involvement with its agents, or any agent, was stated by Mr. Roby at his deposition:

Q. Mr. Roby, did any agent, either before or after your directive of June 25, 1962, contact you concerning Romac Resources or Modern Home Institute?

A. I'm glad you asked. I was hoping you would ask. I was wondering why you — I never had an agent mention it to me.

Q. Either before or after June 25, 1962?

A. No.

(Roby dep. p. 5085; Appx. 419a). Mr. Crossley had no contact with agents (Crossley dep. p. 5055; Appx. 401a). Nor did Mr. Coakley (Coakley dep. 5127; Appx. 440a).

Accordingly, there is no place in the Record of this case, in its volume and expanse, that indicates Travelers had any involvement with any other company or any agent in its decision not to purchase Plaintiffs' product, either before or after Mr. Coakley's letter of May 18, 1962, nor before or after Mr. Roby's directive of June 25, 1962, nor before or after Mr. Crossley's letter of July 5, 1962.

Therefore, any allegation that Travelers participated in a "campaign of pressure" is specious.

VI. The District Court Did Not Err in Granting Summary Judgment to the Travelers.

Given the foregoing, the District Court did not err in its Ruling of June 18, 1974 on Travelers' Motion for Summary Judgment. Even applying the criteria as set forth by Plaintiffs in their Brief (pgs. 10-12) the District Court's ruling was a correct one. The reason for this is quite simple: Travelers had no involvement with any other party

outside of the Travelers at any time before, during or after its decision not to purchase Plaintiffs' product. This position is no better set forth than in the Plaintiffs' Answers to Travelers' Interrogatories of May 1, 1972 in which Travelers, taking every paragraph alleging violation of the anti-trust laws, asked Plaintiffs what acts of Travelers violated the allegations set forth therein. In their Answers to each of these interrogatories all Plaintiffs could do was allege Mr. Roby's directive of June 25, 1962 and Mr. Crossley's letter of July 5, 1962 (Appx. 189-204aaa).

Lastly, as to the "motive or intent" that Plaintiffs stress the District Court should have looked into (Appellants' Brief pg. 13), what *were* Travelers' motives in sending out this letter? Quite simply, because of the notoriety this situation had attained, and the involvement by the Insurance Commissioner of Connecticut, it wished to inform its agents of what had transpired, and that Travelers was not participating in it.

Mr. Roby's directive was simply a device to reassure Travelers' agents its position as to ownership of expiration lists; since, after all, these men are Travelers' marketing force and Travelers was, and is, dependent on them for marketing its product (Crossley dep. pp. 5066-5070; Appx. 406a, 410a. Roby dep. p. 5012; Appx. 382a).

That was the "intent". What was the "motive"? This is best set forth in a question proposed by Judge Clarie to Plaintiffs' counsel at the Hearing when he asked: "Wouldn't that be good customer relations to do that?" (Transcript, *supra* at p. 80)

Given these circumstances, the District Court was, by any standard, correct in granting Travelers' Motion for Summary Judgment. See *First National Bank vs. Cities Service Co.*, 391 U.S. 253, 289-290 (1968).

CONCLUSION

This case has had a long, protracted history involving dealings between the parties which, although briefly, occurred over 12 years ago. Plaintiffs took their case against Travelers to the Department of Justice, which found no violation whatsoever. (See correspondence from Department of Justice, Nov. 13, 1964; and to Department of Justice, Nov. 20, 1964. Appx. 70-71aaa). Thereafter, in 1966, just in time to avoid the running of the Statute of Limitations, Plaintiffs instituted suit.

They have had full access to any and all of Travelers' personnel they wished and at no time had they been denied any documents they requested. From all of this what has evolved is very simple: Travelers' decision not to purchase Plaintiffs' product was unilateral in nature.

It is submitted that Plaintiffs have had their day in court, and the District Court was justified in its ruling of June 18, 1974.

Accordingly, the District Court's Ruling should be upheld.

Respectfully submitted,

The Travelers Insurance Company
The Travelers Indemnity Company

Appellees

By George D. Brodigan

McNamara & Brodigan
102 Oak Street
Hartford, Connecticut 06106

Attorney for Appellees